

In the Matter Of:
THE AK EDUCATION FUND vs FENUMIAI

ORAL ARGUMENT

October 15, 2020

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1 IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
2 THIRD JUDICIAL DISTRICT AT ANCHORAGE

3
4 THE ALASKA CENTER EDUCATION FUND, et al.,

5 Plaintiffs,

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vs.

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GAIL FENUMIAI, et al.,

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Defendants.

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Case No. 3AN-20-08354 CI

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ORAL ARGUMENT

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Pages 1 - 76

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Thursday, October 15, 2020

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9:05 a.m.

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BEFORE THE HONORABLE ANDREW GUIDI
Superior Court Judge

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**CERTIFIED
TRANSCRIPT**

THE AK EDUCATION FUND vs FENUMIAI
ORAL ARGUMENT on 10/15/2020

<p>Page 2</p> <p>1 A-P-P-E-A-R-A-N-C-E-S</p> <p>2 For the Plaintiffs:</p> <p>3 KEVIN R. FELDIS (via telephone)</p> <p>4 ALEXI M. VELEZ (via telephone)</p> <p>5 PERKINS COIE, LLP</p> <p>6 1029 West 3rd Avenue, Suite 300</p> <p>7 Anchorage, Alaska 99501</p> <p>8 (907) 279-8561</p> <p>9 For the Defendants:</p> <p>10 LAEL HARRISON (via telephone)</p> <p>11 STATE OF ALASKA, DEPARTMENT OF LAW</p> <p>12 155 South Seward Street</p> <p>13 Juneau, Alaska 99801</p> <p>14 (907) 586-5240</p> <p>15 Also Present:</p> <p>16 DIRECTOR GAIL FENUMIAI, DIVISION OF ELECTIONS</p> <p>17 (via telephone)</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p>Page 4</p> <p>1 you.</p> <p>2 THE COURT: And also I think we have Kevin</p> <p>3 Feldis, attorney for Alaska Public Interest Research</p> <p>4 Group.</p> <p>5 MR. FELDIS: Yes, Your Honor. Good morning.</p> <p>6 THE COURT: Good morning. And I think</p> <p>7 Mr. Feldis is also -- are you attorney for Floyd</p> <p>8 Tompkins as well?</p> <p>9 MR. FELDIS: Yes, Your Honor. We're</p> <p>10 appearing on behalf of the Alaska Center Education</p> <p>11 Fund, the Alaska Public Interest Research Group, and</p> <p>12 Mr. Floyd Tompkins.</p> <p>13 THE COURT: All right. Thank you.</p> <p>14 And on the defense side, I think we have Gail</p> <p>15 Fenumiai.</p> <p>16 MS. FENUMIAI: Yes, Your Honor. Gail</p> <p>17 Fenumiai is here.</p> <p>18 THE COURT: Fenumiai, thank you. Thank you</p> <p>19 for helping me with the pronunciation.</p> <p>20 MS. FENUMIAI: Certainly.</p> <p>21 THE COURT: And I encourage everyone who, if</p> <p>22 I've mispronounced your name, please don't be shy</p> <p>23 about correcting it. With my last name, I've had to</p> <p>24 go through life doing that. So I certainly</p> <p>25 understand the right to have your name pronounced as</p>
<p>Page 3</p> <p>1 9:05 a.m.</p> <p>2 THE COURT: This is Judge Guidi. We're on</p> <p>3 record in Case No. 3AN-20-08354 Civil. The case has</p> <p>4 a long caption, but the essence of it is the Alaska</p> <p>5 Center Education Fund, et al. versus Gail Fenumiai,</p> <p>6 et al., and the State of Alaska, Division of</p> <p>7 Elections on the defense side.</p> <p>8 We're here now for oral argument on a pending</p> <p>9 motion for a preliminary injunction filed by the</p> <p>10 plaintiff in the case. And we have both sides; let</p> <p>11 me go through a roster of folks that I understand are</p> <p>12 on the line. Everyone is participating by telephone.</p> <p>13 We also have a lot of folks who are listening in, a</p> <p>14 media representative, and that's totally fine.</p> <p>15 The roster that I'm covering, though, is just</p> <p>16 for those who are parties or their counsel. So let's</p> <p>17 begin on the plaintiffs' side. I understand that we</p> <p>18 have Alexi Velez, attorney for Alaska Public Interest</p> <p>19 Research Group.</p> <p>20 Are you there, sir?</p> <p>21 MS. VELEZ: Yes, I'm here. Ms. Velez on</p> <p>22 behalf of all plaintiffs.</p> <p>23 THE COURT: I'm sorry, yes, it's Alexi. I</p> <p>24 misread your name. Sorry, Counsel.</p> <p>25 MS. VELEZ: No problem, Your Honor. Thank</p>	<p>Page 5</p> <p>1 accurately as possible.</p> <p>2 I also think we have Lael Harrison, an</p> <p>3 attorney from the Attorney General's office,</p> <p>4 representing the Division of Elections.</p> <p>5 Are you there, Ms. Harrison?</p> <p>6 MS. HARRISON: Yes, I am. Thank you, Your</p> <p>7 Honor.</p> <p>8 THE COURT: All right. So I was planning on</p> <p>9 one hour of argument, a half-hour to each side.</p> <p>10 Plaintiff would get to go first and have a rebuttal</p> <p>11 opportunity.</p> <p>12 So, Ms. Velez or Mr. Feldis, which one of you</p> <p>13 will be arguing, or will you both be dividing the</p> <p>14 argument today?</p> <p>15 MR. FELDIS: Thank you, Your Honor. This is</p> <p>16 Mr. Feldis. I'll be handling the argument today.</p> <p>17 And if I understood you correctly, did you say each</p> <p>18 side will have 30 minutes and, if so, could we</p> <p>19 reserve some of that time for our rebuttal?</p> <p>20 THE COURT: That's correct. How much time</p> <p>21 would you like to reserve?</p> <p>22 MR. FELDIS: Could I please reserve ten</p> <p>23 minutes for rebuttal, Your Honor?</p> <p>24 THE COURT: Not a problem. All right. We'll</p> <p>25 track your time. All right.</p>

<p>Page 6</p> <p>1 And so, Ms. Harrison, you have the full 30 2 minutes all in one block, okay? 3 MS. HARRISON: Yes, thank you, Your Honor. 4 And also before we begin, I have a procedural matter 5 to bring up. So if we could make a little time for 6 that. 7 THE COURT: All right. Let's take care of 8 any preliminary matters before we start the argument. 9 Ms. Harrison, you can go first. 10 MS. HARRISON: Yes, Your Honor. I'd like to 11 make a motion to strike the filing of the plaintiff 12 this morning. Maybe half-an-hour or 45 minutes ago 13 the plaintiff filed an additional 116 pages of 14 exhibits with a cover pleading and quite a lot of 15 highlighting in the exhibits that appears 16 argumentative. 17 Your Honor, this is the oral argument. We're 18 at the final step in the process of deciding the 19 plaintiffs' motion. The plaintiffs had their 20 opportunity to present evidence. They had their 21 opportunity to request some kind of an evidentiary 22 hearing. And, Your Honor, I don't see anything about 23 these exhibits that couldn't have been presented 24 earlier. I haven't had much time to go through them, 25 with them being filed so late, but one is dated</p>	<p>Page 8</p> <p>1 that we did want to highlight for the Court and of 2 course give the defendants an opportunity to know 3 we'd be referencing them. 4 So the first one is this Absentee Review 5 Board Manual and Procedures, which is published by 6 the State of Alaska, Division of Elections. 7 Unfortunately, it is not publicly available that we 8 know about. We submitted that document with our 9 motion, and in speaking to Ms. Harrison last night 10 inquired whether there was an update to that. Again, 11 not publicly available. She very helpfully told me 12 that there was, and that's what we provided to the 13 Court. I think everything is fairly consistent with 14 the older version of that document, but I do think 15 given the importance of the issue here today, that I 16 wanted everybody working off of the most recent 17 version so there's no concern that something material 18 has changed that's not in the record. So that's 19 really the first and most important document here, is 20 this Absentee Review Board Procedures published by 21 the Division that we have put in our supplemental 22 exhibit this morning just so that the Court and 23 everybody knows what we're working off of. 24 The other documents are similar. We have 25 something from the Municipality, a public record, not</p>
<p>Page 7</p> <p>1 April 2020. Another is dated October 8, which is the 2 date that they filed. There's a manual here from the 3 Division of Elections that the plaintiffs say on 4 their cover sheet correctly they didn't get until 5 yesterday, but that's because they did not request it 6 until yesterday. Obviously, the defendants would 7 have provided it any time it was requested, and when 8 they did request it, we provided it. 9 So, Your Honor, this is sort of another 10 inappropriate effort, I believe, on the part of the 11 plaintiffs to frankly railroad this process and to, 12 you know, present evidence so late that the Division 13 has no time to meaningfully read it or respond to it. 14 One of these articles is sort of in the nature of 15 trying to be expert testimony. It's by outside 16 researchers, and that kind of thing is just really 17 inappropriate at this stage. 18 So I'd like to move to strike that. 19 THE COURT: All right. Let me give the other 20 side a chance to respond. 21 Mr. Feldis or Ms. Velez. 22 MR. FELDIS: Yes, thank you, Your Honor. Let 23 me address that. I think what we're looking at in 24 the supplemental exhibits are mostly public records, 25 things that are out there in the public realm, but</p>	<p>Page 9</p> <p>1 readily available. Something that we just came upon 2 ourselves. It just shows that when people are given 3 the opportunity to cure, which they are in the 4 municipal elections; when they are given notice of a 5 problem and the ability to cure, they do so in a very 6 high percentage rate. We thought that was relevant 7 for the Court to know. 8 There was also some very recently published 9 research that we've just come upon. It was just 10 published here in October a few days ago talking 11 about the fact that there's a lot of new absentee 12 voters this year, and statistics show that those 13 folks are more likely to make honest mistakes. So 14 that's in there as well. 15 And then I think the last thing is just a 16 printout of what's available on the -- from the State 17 data in terms of this very election showing that the 18 State is already calculating votes that are being 19 rejected for various reasons. Again, that's just 20 kind of live realtime data that we pulled off this 21 morning, again, to help the conversation today. 22 So nothing here is presented in the spirit of 23 ambushing anybody, of course. It's really in the 24 spirit and in the fact of having this before us while 25 we're doing this proceeding, you know, necessarily by</p>

<p style="text-align: right;">Page 10</p> <p>1 telephone today so we know what we're talking about 2 when we reference things. 3 THE COURT: All right. Thank you, 4 Mr. Feldis. The Court has to grant the motion to 5 strike for the reason that is sort of fundamental to 6 any fair proceeding that -- particularly when one 7 side has ample time to prepare and file a complaint 8 with no imposed time limits. The other side is then 9 hurried by the nature of the process and by a motion 10 for expedited consideration, which was granted to 11 respond in an expedited way to -- it's really 12 important for the decision-making process that we 13 have a level playing field and that both sides are 14 working off the same -- from the same standpoint of 15 the procedural fairness of the hearing. 16 It's fundamental in the Appellate Rules and 17 in the Civil Rules that new materials raised in reply 18 are typically not allowed to be considered. These 19 are materials that should have been raised in the 20 original motion. And were this is a normal 21 proceeding, I wouldn't have any problem with 22 continuing the hearing for a period of time, but then 23 were this a normal proceeding we would probably not 24 be holding the hearing today, and we would 25 probably be -- the parties would probably be going</p>	<p style="text-align: right;">Page 12</p> <p>1 Ms. Fenumiai is on the line today and I think it 2 might be very helpful to have her testify for a few 3 brief issues today. Really what I'm just trying to 4 make sure is that there's no dispute about the State 5 of Alaska, Division of Elections Absentee Review 6 Board Manual that I've been talking about. And 7 perhaps it's something that the State is prepared to, 8 you know, stipulate to. I don't think there's any 9 question that this document the State sent me last 10 night is true and accurate. I received it from the 11 State. 12 But if there's any dispute about that 13 document, then I would ask that Ms. Fenumiai be asked 14 to verify that. It is authentic, and that's the most 15 recent version of the document that governs the 16 Absentee Review Board's work. 17 THE COURT: Well, Mr. Feldis, when the 18 plaintiffs asked for a hearing, they asked for oral 19 argument on the motion. They give no indication that 20 there were any issues of fact that required discovery 21 and/or litigation or deposition for fact-finding by 22 the Court. They asked the Court based on the briefs 23 to make findings as a matter of law as to whether a 24 preliminary injunction should be ordered. Based on 25 those representations, I set aside an hour for oral</p>
<p style="text-align: right;">Page 11</p> <p>1 through a period of a significant amount of discovery 2 and exploration of facts before they come to court 3 and argue the case. 4 All of that has been -- all of that typical 5 process has been truncated for the needs of this 6 case. So to inject a lot of new materials, no matter 7 how innocent they may be portrayed, raises the 8 specter that one side is being sandbagged, that the 9 motion was filed on one basis and on one basis -- one 10 set of facts, but that at the last minute the judge 11 is being asked to consider new evidence and new 12 materials that weren't raised originally. 13 To the extent that materials that may be 14 enclosed were actually included with the original 15 filing, they'll be considered, but it sounds like 16 they're all new materials. There may be updated 17 versions of earlier documents, but they're still new 18 materials; so it will be stricken for the purposes of 19 today's hearing. 20 Are we ready to proceed, or are there more 21 preliminary matters? 22 MR. FELDIS: Yes, Your Honor. This is 23 Mr. Feldis again. 24 We did give notice and, again, it was 25 yesterday, but given the Court's ruling we know</p>	<p style="text-align: right;">Page 13</p> <p>1 argument. There is no -- there was no advance notice 2 that this would be an evidentiary hearing, and I 3 wasn't really prepared for that eventuality. 4 MR. FELDIS: Understood, Your Honor. And 5 maybe it's as simple as the State just stipulating 6 that the document that they sent to us last night is 7 true and correct. 8 THE COURT: I don't know if the State wants 9 to stipulate to anything, Counsel, but you can ask 10 them outside the presence of the Court. It's not 11 something that we need to mediate here on the record. 12 So I'm prepared to entertain the oral argument that I 13 was told was what your side wanted to have, and I'm 14 ready to proceed. 15 MR. FELDIS: Very well. Understood. 16 THE COURT: All right. Go ahead, Counsel. 17 MR. FELDIS: Thank you, Your Honor. Again, 18 this is Kevin Feldis, and I represent the Alaska 19 Center Education Fund, the Alaska Public Interest 20 Research Group, and Mr. Floyd Tompkins. Thank you 21 for taking oral argument today. 22 Democracy is hard and it can't be taken for 23 granted. We all must work hard to protect it. And 24 most fundamental and most relevant here today to our 25 democracy is the right to vote. We're here today</p>

<p style="text-align: right;">Page 14</p> <p>1 because we are currently in a situation where many 2 hundreds of eligible, and I want to emphasize 3 eligible Alaskan voters, will be disenfranchised if 4 we don't take immediate action to provide notice to 5 those voters and an opportunity to cure missing 6 signatures or missing voter identification 7 information. 8 Fortunately, the facts show that the Division 9 of Elections already identifies these eligible voters 10 who omit signatures or voter identification 11 information. They already enter that information on 12 a daily basis into an electronic database and they 13 already notified those voters, but they notified them 14 too late. They notified them after the election is 15 over, after the votes are certified. 16 I think central to our discussion today is 17 that here in Alaska there's at least 22 days of time 18 in which the State and the Division of Elections has 19 the ability to notify voters, instead of waiting to 20 notify them during this 22-day window and provide 21 them an opportunity to correct those omissions. 22 We're not asking for any of the requirements 23 of the election to be modified. We're just asking 24 for the procedures to be put in place in a way that's 25 meaningful, in a way that protects democracy, and</p>	<p style="text-align: right;">Page 16</p> <p>1 omitted. 2 Now, there's nothing in the remedy that's 3 being requested today that requires the Court to find 4 any Alaska law unconstitutional or to write any new 5 law contrary to what the State has asserted. In 6 fact, the Alaska Supreme Court has consistently 7 instructed that when reviewing and interpreting 8 election statutes where there's any reasonable 9 construction of a statute that can be found, which 10 will avoid disenfranchisement, the courts should and 11 will favor it. 12 THE COURT: So, Counsel, if I may interject. 13 Are you saying there's nothing unconstitutional about 14 the existing absentee ballot statutes? 15 MR. FELDIS: Only as applied, Your Honor. 16 The way it's currently applied, it is 17 unconstitutional. But when the Court can read that 18 statute and apply it in a constitutional way, as 19 we're requesting, that's what the Alaska Supreme 20 Court indicates should be done and can be done. 21 THE COURT: How long has it been applied in 22 the way it's being applied? 23 MR. FELDIS: Well, the State has put in their 24 briefing that there's been changes made to this 25 particular provision over the years, so that it has</p>
<p style="text-align: right;">Page 15</p> <p>1 protects the fundamental right to vote, which the 2 Alaska Supreme Court as well as the U.S. Constitution 3 have emphasized is so very vital. 4 The U.S. Supreme Court has said there's 5 nothing -- there is more -- there is more to the 6 right to vote than the right to mark a piece of paper 7 and drop it in a box or the right to pull a lever in 8 a voting booth. The right to vote includes the right 9 to have the ballot counted, and that's Reynolds v. 10 Sims, the U.S. Supreme Court. 11 The Alaska Supreme Court has said in Miller 12 v. Treadwell: The voter shall not be disenfranchised 13 because of a mere mistake and the voter's intention 14 shall prevail. And that's what we're talking about 15 here, an honest mistake, a predictable mistake, a 16 mistake that we know will happen to eligible voters 17 during this election cycle more than ever. Due to 18 the pandemic we have an unprecedented number of 19 people voting by mail-in ballot. 20 The Division of Elections has invited mail-in 21 ballots, and their website clearly states there's no 22 reason necessary; anyone can apply. But what we now 23 know, and what the plaintiffs now know, is that these 24 votes will be rejected and they will not be counted 25 if an honest mistake is made and a signature is</p>	<p style="text-align: right;">Page 17</p> <p>1 been applied in different ways including with the 2 signature requirement. But what we're talking about 3 now is an ongoing violation, an ongoing burden on 4 voters, an undue burden that's continuing. So we're 5 not looking just retroactively; we're looking 6 prospectively. And there's no question that this 7 election is unlike any other in terms of the vast 8 numbers of mail-in voters. The large majority of 9 them are new and we know that the new voters are much 10 more likely to make mistakes, honest mistakes, than 11 folks who have done this before. 12 I think it's helpful to look at what's not 13 disputed here. The way things currently work, what 14 the facts are, what's undisputed as a way of 15 understanding really the request being made. It's a 16 very, very slight administrative request to the 17 Division of Elections. It's undisputed that the 18 Absentee Review Boards begin work 7 days prior to the 19 election and continue until 15 days after the 20 election. That's the 22-day window that we're 21 talking about. 22 It's undisputed that the Absentee Review 23 Boards currently in their current training and 24 capabilities review the ballot envelopes and make and 25 accept or reject determination based upon whether the</p>

<p style="text-align: right;">Page 18</p> <p>1 voter has signed the envelope and included voter 2 identification information. We know this year, after 3 the recent Supreme Court decision, that the witness 4 of signatures will not be required for this election 5 only.</p> <p>6 But we know the Absentee Review Board makes 7 that initial decision and they record that 8 determination using a code. In this case it would be 9 the V code in the Voter Registration and Election 10 Management System known as VREMS that the Division 11 uses. They're already doing that, and they're doing 12 it on a daily basis as the absentee ballots are 13 reviewed starting 7 days before the election.</p> <p>14 Not only that, but reports are generated on a 15 daily basis, and those reports, as we see from the 16 Absentee Review Board Manual that was submitted and 17 as I said there's an update, but it hasn't changed in 18 any parts that we're talking about today, a detailed 19 report is generated every day that includes the 20 voter's name, the voter's address, and the reason the 21 ballot is rejected. All that information is already 22 being inputted; no new training or procedures are 23 required.</p> <p>24 The State is already notifying voters if 25 their ballot is rejected as required by statute, but</p>	<p style="text-align: right;">Page 20</p> <p>1 should be earlier. I think what you're getting at 2 is: Is there a need to declare this provision 3 unconstitutional? No. So this is a rolling 4 deadline. If somebody's ballot is obviously late, 5 they're going to be given notice that their vote 6 wasn't counted because it was late. And we're not 7 asking that that vote be counted.</p> <p>8 If there's -- there's a whole slew of reasons 9 for rejecting ballots. People might not register to 10 vote and they might have, through some mechanism, 11 voted. There's a number of reasons and the ballot 12 manual gives all the codes. We're talking about 13 something very specific here.</p> <p>14 It's the missing voter signature and the 15 missing voter ID number, whether it's a date of birth 16 or the last four of the Social Security number. 17 We're asking that be done beginning on a rolling 18 basis to give that opportunity for that vote to be 19 counted. So it's really an as-applied concern that 20 we have here.</p> <p>21 I'm not sure if that answered your question, 22 Your Honor.</p> <p>23 THE COURT: Thank you. But just to clarify, 24 then, in order to grant the relief you request, I 25 would need to specify a particular date by which the</p>
<p style="text-align: right;">Page 19</p> <p>1 they're doing it too late. We're asking here today 2 that that process be moved forward, that those 3 notifications be mailed out; the information is 4 there; the envelopes can be printed. We're asking 5 that that be done in a timely manner.</p> <p>6 THE COURT: Now, is there, if I may ask, a 7 basis in the statute, any express language that 8 requires the notification be at some particular time?</p> <p>9 MR. FELDIS: Yeah, the statute uses language 10 that says it must be -- depending on whether it's a 11 general or a primary election, between 10 days -- not 12 less than 10 days after the results of the primary 13 and not less than 30 days after certification results 14 of a general or special election.</p> <p>15 THE COURT: Okay. And is the Division -- 16 you're not claiming that that language is 17 unconstitutional?</p> <p>18 MR. FELDIS: Correct, Your Honor. What's 19 unconstitutional is to apply it in a way that doesn't 20 provide an opportunity, that waits too long to 21 provide that notice.</p> <p>22 THE COURT: So you're saying the statute 23 deadline should be earlier than what the statute 24 actually provides?</p> <p>25 MR. FELDIS: Well, the statute deadline</p>	<p style="text-align: right;">Page 21</p> <p>1 Division of Elections -- I would need to accelerate 2 the statutory date, let me put it that way, that's 3 currently provided for by which the Division of 4 Elections notifies absentee voters that their ballots 5 have been -- that their votes have been, because of a 6 formality or a defect, have not been counted, right?</p> <p>7 MR. FELDIS: There would need to be some 8 direction to the Division, correct. So it wouldn't 9 require calling the statute unconstitutional. We're 10 challenging -- we're not challenging that the statute 11 says you must be notified by X date. We're saying 12 that failing to provide notice and cure of a rejected 13 ballot on the basis we're alleging, burdens the right 14 to vote to the extent that it's unconstitutional and 15 doesn't provide procedural due process. So, yes, 16 there would need to be some --</p> <p>17 THE COURT: I guess I'm not following how it 18 burdens the right to vote. People can vote in 19 person. They can vote by mail. They can vote 20 absentee. And the Department, does it not, have -- 21 and the statute lays out formal requirements for each 22 process, but today we're talking about absentee 23 voting. So the voter follows a process. They submit 24 a vote.</p> <p>25 How exactly are they disenfranchised?</p>

<p style="text-align: right;">Page 22</p> <p>1 MR. FELDIS: Well, then we're talking about 2 the balancing test, which we can get into. So we 3 have to balance the magnitude of the injury, which 4 means their vote will not be counted. These are 5 estimated 500 Alaskan voters who are eligible to vote 6 whose votes will not be counted in this election. 7 That's the injury here weighed against the interest 8 of the State in taking these extra steps, or putting 9 it another way: What legitimate State interest is 10 there in not putting in a notice-and-cure mechanism 11 to count these votes? That's the balancing test that 12 applies. What I've laid out here and what the -- 13 THE COURT: And what about the argument of 14 the State that that is a policy decision for the 15 Legislature? 16 MR. FELDIS: Well, we're not talking about a 17 policy decision. We're talking about protecting and 18 not placing undue burden on the right to vote, the 19 constitutional and protected right to vote, and 20 that's what the Alaska Supreme Court has said. We're 21 not -- we're trying to get every vote the opportunity 22 to be counted. We must construe the statute in a way 23 that preserves that right. 24 We know that Alaska voters, and this is a 25 quote from Miller v. Treadwell: They arrive at the</p>	<p style="text-align: right;">Page 24</p> <p>1 MR. FELDIS: Yes. The burden is very, very 2 slight. We're not talking about taking away any kind 3 of protections here in terms of making sure that the 4 voter is who he or she says she is. We're not 5 talking about putting in new policies and procedures 6 or hiring new workers. 7 What we're talking about are three things, 8 three options, and each one of these is an option 9 available. No. 1 is simply mailing out that -- 10 mailing out the notice immediately. That's as simple 11 as hitting mail merge on a daily basis. And if you 12 take 500 ballots and divide that by the 22 days that 13 are available, these ballots are already coming in, 14 and they're coming in on a rolling basis, that's 15 probably something like 25 ballots a day that are 16 being put into a pile and entered into the VREMS 17 system already with the code not to be counted for 18 missing signature. It's simply -- 19 THE COURT: Well, right now you're arguing 20 factual matters. Do we have evidence -- any sworn 21 testimony in the record or admissible evidence to 22 support that? 23 MR. FELDIS: Yes, Your Honor. It's the 24 Absentee Review Board Division of Elections Manual 25 that we did submit as Exhibit No. 1 to our motion.</p>
<p style="text-align: right;">Page 23</p> <p>1 polling places with a vast array of background and 2 capabilities. And the due process that we're talking 3 about here is not one that places fault on someone 4 for making what is a predictable error, an omission 5 that we know happens, in a way that the State can 6 easily correct. So that is a burden on the right to 7 vote. 8 The goal here, and I think this is universal, 9 but certainly supported very broadly by the Alaska 10 Supreme Court, is to count every vote we can. Not to 11 put in -- not to withhold from taking steps that are 12 going to discard votes, that are going to keep them 13 in the trash bin, and that's what's happening here. 14 We know we can do something about it. The burden is 15 very, very slight. So if we can do anything that 16 avoids even one person's vote from being rejected -- 17 THE COURT: Why don't you describe the 18 burden, Mr. Feldis. What do you -- what is your 19 understanding of the burden in this case? 20 MR. FELDIS: Well, the burden on the State is 21 very slight. We're not talking about throwing -- is 22 that what you're talking about, or the burden on the 23 voter, Your Honor? 24 THE COURT: Well, the burden of implementing 25 the curing mechanism that you see.</p>	<p style="text-align: right;">Page 25</p> <p>1 It spells out those procedures in the manual. 2 And I would also refer to the affidavit of 3 Julie Hussman that is our Exhibit 3, which is -- 4 she's the elections supervisor for the Anchorage 5 Office of the Division of Elections for the State of 6 Alaska talking about the process of reviewing 7 ballots. The board checks to see if the ballot was 8 signed by the voter and logs it as missing. So this 9 is the procedure outlined in the evidence before the 10 Court. 11 And as I said, I think these are public 12 records as well. So we're not asking the Court to 13 rely on anything that isn't factual here. So the 14 burden is very minimal, to send these envelopes and 15 notices to voters immediately. The Division already 16 has an affidavit certification prepared that they use 17 for people who receive their ballots electronically 18 and that's also admitted. 19 If you'll remember, there was an affidavit by 20 Ms. Amy Olson, who is a registered Alaska voter 21 currently in the Air Force Reserves. And she 22 received her absentee ballot electronically and she 23 submitted the voter certificate and identification 24 form, which she sends in separately. It's not 25 actually on a ballot envelope.</p>

<p style="text-align: right;">Page 26</p> <p>1 So the form is already there. The ability to 2 mail notices is already there. We saw just last week 3 that the Division of Elections has the ability; they 4 mailed out 4,800 new notices when they left the 5 candidates' name off the election pamphlet. We're 6 talking about 500 letters over the course of 22 days 7 as one of the remedies. 8 Second is if you log on right now to my 9 Alaska Vote dot Com, you will be able to see the 10 status of your vote. That's statutorily required as 11 well. That's something that the Division could 12 simply update. Voters can log on and see whether 13 there was a problem with their ballot, and then they 14 could download the form and submit it. So, again, 15 not overly burdensome. 16 And the third way is just making it available 17 to public record searches such that any time after 18 election day people can ask the Division for a list 19 of the names and addresses, which is statutorily 20 required under the public access laws, to be 21 provided, and as long as that's provided timely, then 22 there's lots of very helpful groups that will notify 23 the voters if they don't look themselves, that their 24 vote is not being counted because they forgot to sign 25 or include the voter identification information.</p>	<p style="text-align: right;">Page 28</p> <p>1 that if we ask the members of the Ballot Review 2 Board, the folks who are separating out these ballots 3 and entering in the information right now into the 4 computer system every day that they're working, if we 5 ask them if they were willing to take a few extra 6 minutes every day to make sure that someone that they 7 know could have their ballot counted who forgot, 8 honestly forgot to put a signature, an honest 9 predictable mistake, they would probably say yes. 10 That's my belief. 11 So when we look at the burdens here and we 12 balance them out, I think clearly it weighs in favor 13 of enfranchising voters and having their votes 14 counted. 15 I think I've taken my 20 minutes, Your Honor. 16 THE COURT: All right. Thank you. 17 MR. FELDIS: And I'd like to reserve the 18 remaining time. Thank you. 19 THE COURT: Ms. Harrison, will you be arguing 20 for the State? 21 MS. HARRISON: Yes, I will, Your Honor. 22 THE COURT: All right. You have the floor. 23 MS. HARRISON: Thank you, Your Honor. Again, 24 just to introduce myself more formally, I'm Lael 25 Harrison with the Department of Law. I also have my</p>
<p style="text-align: right;">Page 27</p> <p>1 So these are not high burdens on the State. 2 There's at least three options there, all of which 3 would be good and important, but we shouldn't let 4 perfection get in the way of implementing a 5 reasonable solution that will allow votes to be 6 counted, votes that could very well matter in this or 7 any other election. 8 I think that's a clear message of what the 9 Alaska Supreme Court has said. We shouldn't be 10 valuing one person's vote over another. We shouldn't 11 be construing a statute to disenfranchise voters. 12 So what's the interest of the State? In 13 doing that, there really isn't one. The 14 administrative burden here is low. There's no new 15 staff that need to be trained, no nuanced policy 16 decisions, no new programs; no laws will be violated 17 by ordering this relief. It's, in our view, a very 18 common-sense process that fits seamlessly into what's 19 already being done. 20 I'll note in Ms. Fenumiai's affidavit where 21 she indicates, look, you know, they're very busy this 22 time of year. Nothing in there says that this is 23 impossible. Nothing in there says that this can't be 24 done. We're talking about a few extra minutes each 25 day by the Ballot Review Boards. I venture to guess</p>	<p style="text-align: right;">Page 29</p> <p>1 co-counsel, Tom Flynn, on the phone and, as you know, 2 Division Director Gail Fenumiai is also present for 3 the Division of Elections. 4 Your Honor, the plaintiffs are not asking 5 this court to strike down a law as unconstitutional; 6 they're asking this court to write a new one. As 7 Mr. Feldis was just very clear, they're not asking 8 this court to eliminate the requirement that a voter 9 correctly fill out their certificate, sign the oath, 10 provide identifying information. They're not asking 11 for a court order requiring the Division to just 12 count blank ballots. 13 They understand and they agree that having 14 those procedures, requiring voters to sign ballots 15 and provide identifiers, are important anti-fraud 16 measures that are justified by the State's very 17 legitimate interest in a secure election. And so 18 that's the end of the inquiry, Your Honor. That is 19 the end of the Anderson verdict test. That is the 20 test of whether a statute is unconstitutional. 21 Is the statute on the books unjustified? And 22 here the statute on the books is plainly justified by 23 State interests and that's all there is for this 24 court to do today. This court does not have the 25 power to decide that a different law might be better</p>

<p style="text-align: right;">Page 30</p> <p>1 or the power to conduct an inquiry into how to 2 improve the system. Those are questions for the 3 Legislature, and there's a public and politically 4 accountable process that that goes through. But 5 that's what the plaintiffs are asking this court to 6 do.</p> <p>7 And, Your Honor, I'd also like to point out 8 that motion for a preliminary injunction is also 9 unusual in that it's so very vague. Your Honor, it 10 seems that the plaintiffs are asking the defendants 11 and this court to decide to tell them what it is 12 they're asking for. You know, to go out there and do 13 the research about what it is that all other 50 14 states do and decide whether any of those, you know, 15 might be a good idea to adopt here in Alaska and see 16 if any of those would mesh with the existing system 17 or look into, you know, how can we reprogram or 18 change what we're already doing.</p> <p>19 Rule 65, which is the Rule of Civil Procedure 20 addressing preliminary injunctions, requires 21 preliminary injunctions to be specific and detailed, 22 but here the plaintiffs are sort of asking the 23 defendants and this court to fill in those specifics 24 and to fill in those details for them.</p> <p>25 THE COURT: Ms. Harrison.</p>	<p style="text-align: right;">Page 32</p> <p>1 defective or lacks information. But I don't know. 2 It seems that maybe the obvious distinction, 3 or one of them, is that the State has months to 4 process those. So apart from that comparison, I'm 5 not saying it's a great comparison, but it does evoke 6 interest. Apart from that, what considerations 7 prompt the -- what is the importance to the State, to 8 the electorate, to the Division of time in this case?</p> <p>9 I mean, it seems that we're all racing 10 against the clock or we have some time limit here. 11 What is the issue with regard to that? What are the 12 stakes with regard to time limits of election results 13 and counting?</p> <p>14 MS. HARRISON: Sure. Of course I'll answer 15 that question, but first I wanted to just make a 16 point, Your Honor, about this word 17 "disenfranchisement" that the plaintiffs have used 18 and that you just used in a question. I think we 19 have to be very careful about that.</p> <p>20 Disenfranchisement is not a voter's own 21 error. We know that from the United States Supreme 22 Court, and we know that from the Alaska Supreme 23 Court. I'll point Your Honor to the case of Willis 24 v. Thomas, which is the Alaska Supreme Court's 25 recount case. That very clearly held that a voter</p>
<p style="text-align: right;">Page 31</p> <p>1 MS. HARRISON: Yes. 2 THE COURT: I guess I want to just raise a 3 consideration that wasn't touched upon and get your 4 take on it --</p> <p>5 MS. HARRISON: Okay. 6 THE COURT: -- as an intellectual exercise, 7 if I may. With regard -- I was trying to think of an 8 analogy and it's not a great -- it's not a perfect 9 analogy, but, I mean, to some extent the theme here 10 from the plaintiffs is that voters that fail to 11 follow the rules established by law and the Division 12 are being, quote, disenfranchised, and they should 13 have a chance to cure within a specific time frame.</p> <p>14 And I'm thinking: What other situation do we 15 have where a person might seek some -- to exercise 16 some civic obligation or request something from the 17 State where you have certain formal requirements. 18 And the most obvious one I can think of is the 19 application for a PFD. In regard to an application 20 for a PFD, which also can be rejected for a lot of 21 different things, substantive and procedural 22 failings, the State -- the plaintiffs might argue 23 that, gee, look at that situation, Your Honor. In 24 that case the State does kind of, quote, work with, 25 you know, with you if your original application is</p>	<p style="text-align: right;">Page 33</p> <p>1 who had made an error in her registration was not 2 entitled to try to cure it after the deadline and 3 that her vote would not be counted. And the court 4 said: There has to be deadlines. There has to be 5 limitations on this process.</p> <p>6 And the U.S. Supreme Court has said the same 7 thing. You know, I haven't thought of any 8 hypotheticals really outside of the voting context, 9 but certainly we all understand that the polls close 10 at a certain time, and if you lose track of time and 11 you show up at the polls at 8:30 and they've already 12 closed and there's no line, you don't get a do-over. 13 So especially in the elections context, which is 14 everything is happening in a very compressed time 15 period, deadlines matter, and doing something 16 correctly in the time period matters.</p> <p>17 So let me talk about this 22-day window, 18 which is I think what you're asking about, Your 19 Honor. What is the State's interest in time here? 20 How does this all work? Your Honor, I do want to say 21 that I feel Mr. Feldis just sort of testified a bit 22 and provided a lot of supposed factual information 23 outside of his personal knowledge about how this all 24 works. But of course, Your Honor, you need to look 25 at what's in the statutes and look at what the</p>

<p style="text-align: right;">Page 34</p> <p>1 information -- the sworn testimony in the record from 2 people who actually have personal knowledge about how 3 it works at this time. 4 So what's happening in this 22-day window? 5 The Division right now is still certifying the 6 results of the REAA elections, so that that process 7 is still under way and not quite yet complete. The 8 deadline to apply for absentee ballots has not yet 9 passed. That's on the 24th. So the Division is 10 still receiving applications and processing those as 11 well as sending out new ballots while at the same 12 time voted ballots are already coming back in. So 13 the volume of voted ballots that's going to be coming 14 in is going to continue to increase over time. Let 15 me just point out that that continues well past 16 election day because there are always people that 17 vote their ballots on, you know, the 1st or the 2nd 18 or the 3rd even though the post office recommends 19 that folks do it earlier. So those end up coming in 20 after election day. So that process is going to be 21 going on for a long time. 22 You know, it is true that as ballots come in, 23 the Division is logging them, but it is very 24 important, Your Honor, for you to be aware of the 25 statutes regarding the Absentee Ballot Review Board</p>	<p style="text-align: right;">Page 36</p> <p>1 this process of providing in-person polling. I think 2 it really illustrates the extra challenges that the 3 Division is facing this year setting this up, 4 recruiting poll workers, dealing with last minute, 5 you know, changes and resignations, and pulling in 6 new people and training new people. It's a very 7 demanding job, and it's mostly being done by the 8 high-level supervisors. This isn't work that can be 9 done by the administrative staff. So that's 141 -- 10 excuse me -- 441 locations that they're working to 11 get set up and up and running for that. So that's a 12 very time-consuming process. 13 And then of course once -- that kind of gets 14 us out for the next two weeks and we've got the 15 Absentee Ballot Review Boards are going to start 16 meeting the week before the election. That's also a 17 very time-consuming process for Division staff and 18 especially again the managerial-level folks. So once 19 that process starts, they're going to be really 20 engaged with working with those Review Boards on 21 reviewing what ballots should, in fact, be rejected 22 and accepted. 23 Then this kind of gets us up to election day 24 here and what's going on -- you know what's going on 25 on election day, and of course after election day the</p>
<p style="text-align: right;">Page 35</p> <p>1 process. The folks logging ballots have absolutely 2 no authority to make final decisions about whether a 3 ballot is counted or not, and they do not make final 4 decisions. The Absentee Review Board is a very 5 structured process. It's bipartisan. I believe it 6 has four people on it. They work with the Division 7 supervisors and they are the only people that have 8 the authority to make a decision about whether or not 9 a ballot is rejected. So we've got these things 10 going on right now. 11 The Division is also getting ready to start 12 with the early voting and absentee in-person voting 13 process. That starts next Monday. I believe there's 14 about 140 locations that are being set up for that 15 right now. Getting materials out to those locations. 16 Making sure that they've got folks to work those 17 locations, and making sure they've got hand sanitizer 18 and masks and all this additional material that's 19 required this year. 20 Also, Your Honor, I hope very much you get a 21 chance in this expedited schedule to read Exhibit 22 E to the affidavit of Gail Fenumiai. It's a letter 23 that she provided, not even in the context of this 24 litigation, wholly unrelated, to a State senator 25 about what's going on at the Division right now with</p>	<p style="text-align: right;">Page 37</p> <p>1 counting of the in-person ballots, but you also have 2 to remember, Your Honor, there's the question ballot 3 process. There's a separate Question Ballot Review 4 Board, which is a similar process of the Absentee 5 Ballot Review Board. So the supervisors are also 6 going to be working with the Question Ballot Review 7 Boards on their inquiry about which of the question 8 ballots should be counted. So that's going on. 9 Then after the election, the Division is also 10 going to be going through a process of verifying the 11 absentee ballots that they have determined should be 12 counted to make sure that the voter didn't vote some 13 other way, in person or early. So that will be 14 another process that's going on with these absentee 15 ballots before they're actually counted. Then of 16 course we get to the part where we're counting those 17 ballots, the absentee ballots. 18 So there's a lot happening, a lot of layers, 19 one on top of each other, a lot of extra challenges 20 this year related to the pandemic. This is a very 21 tightly packed season, Your Honor. I think that 22 Director Fenumiai's affidavit is very clear. She 23 says: Look, if I'm going to pick up a new project 24 right now, I'm going to have to put something else 25 down. If I am devoting my --</p>

<p>Page 38</p> <p>1 THE COURT: Can I ask a clarification 2 question, Ms. Harrison? 3 MS. HARRISON: Yes. 4 THE COURT: I could have asked this of 5 Mr. Feldis as well, but just to be clear. 6 Are there -- just so I have the timeline 7 straight, are some absentee ballots -- are the 8 defects in some absentee ballots, let me put it that 9 way, detected prior to the election and, if so, are 10 any of those notices sent out prior to the election? 11 MS. HARRISON: Your Honor, the Absentee 12 Ballot Review Board is the one that makes that 13 decision about whether there are defects in the 14 ballot, and that is not sent out prior to the 15 election. 16 Let me talk about something there. Let's 17 just go through the statutes. Let's just take a 18 moment to work right through the statutes, because I 19 think it's important to understand what these notice 20 processes are and what the statutes really provide 21 for here. 22 THE COURT: Go ahead. I have the statutes in 23 front of me. 24 MS. HARRISON: Okay. So if you wouldn't mind 25 turning to Section 15.20.030.</p>	<p>Page 40</p> <p>1 during the ballot-logging process, you know, on a 2 rolling basis before the Absentee Review Board meets, 3 that the statute would allow for, you know, notice to 4 be sent out on that schedule; that's incorrect. 5 Was rejected by the Absentee Ballot Counting 6 Review Board. Of course we wouldn't want to bypass 7 that very important statutory process of having the 8 review board review people's ballots. We don't want 9 the folks -- the administrative folks who are just 10 logging them to be the ones making final decisions. 11 Now let's go down to (i) here. So that was 12 the notice. Have to send notice the absentee ballot 13 was rejected under this section. Then: The director 14 shall mail the materials not later than 10 days after 15 completion of the review of the ballot. So not later 16 than 10 days after. So this does, like you were 17 saying, Your Honor, put an outer limit on when they 18 can be sent. 19 This is interesting. Ten days after for the 20 primary election, but then the next section is 60 21 days after the general election or a special runoff 22 election if there's no further election afterwards. 23 So it's the same thing. If this were a primary and 24 we've got a general coming up soon, or if this is a 25 special election and there's going to be a runoff</p>
<p>Page 39</p> <p>1 THE COURT: We're there. 2 MS. HARRISON: Okay. So as you know, we 3 already went through in our briefing Section B(1): 4 The absentee ballot may not be counted if the voter 5 has failed to properly execute the certificate. The 6 certificate is the one described earlier in 030. 7 But let's now go to the notice provisions 8 that are in Section (h) and (i) and (j). So 9 (h) says: The director shall prepare and mail to 10 each absentee voter whose absentee ballot was 11 rejected under this section. 12 So let's look at that. Was rejected, not may 13 be rejected, not is considering rejecting. It says: 14 Was rejected. So this notice provision contemplates 15 that the decision is already made and it does not 16 contemplate a cure period. 17 Now let's look at "under this section". Was 18 rejected under this section. Well, what's "this 19 section"? What's the title of this statute? It is: 20 Procedure for district absentee ballot counting 21 review, and it starts out: The district Absentee 22 Ballot Counting Review Board shall. So this is 23 contemplating that, again, only the board can make 24 that decision. 25 So the plaintiffs' suggestion that somehow</p>	<p>Page 41</p> <p>1 coming up soon, you need to provide the notice at 2 least 10 days after so the people have a chance to 3 get it right for the next election. 4 That's what this is saying, but if it's a 5 general election or a special election with no runoff 6 and there's not -- and there's going to be another 7 election coming up soon, then the Division has more 8 time than this 60 days. So this is clearly aimed at 9 making sure that voters are able to get it right for 10 the next election. 11 Now, to look at (j), and this is very -- an 12 interesting piece of drafting; (j) says that the 13 Director has to make available a free access system, 14 and then the final line says: The Director shall 15 make this information available through the free 16 access system not less than 10 days after 17 certification of the primary, 30 days after 18 certification of the general. 19 Not less than, so, in fact, it would be 20 contrary to this law as it is written to have the 21 online system have this information 7 days after 22 certification or any time prior to certification. 23 So, in fact, because of this interesting drafting of 24 not later than in (i) and not less than in (j), it 25 appears that the Legislature intended the online</p>

<p style="text-align: right;">Page 42</p> <p>1 system to be one for future reference and not one 2 that would be -- you know, happening in that time 3 frame directly after the election. 4 Your Honor, it was a long answer, but I hope 5 that it helped address your question about timing. 6 THE COURT: Thank you. I appreciate it. 7 Thank you, Counsel. I didn't want to sidetrack you. 8 MS. HARRISON: Sure. 9 THE COURT: So in regard to the original 10 question -- 11 MS. HARRISON: Yes. 12 THE COURT: -- because the impression -- and 13 maybe I'm getting the wrong impression, but the 14 impression I got, my initial impression from reading 15 the original brief, is that the Division is already 16 notifying some -- and this may be incorrect and it 17 may be just a misimpression -- but that the Division 18 is already notifying some absentee voters that their 19 ballots have been rejected and in time for them to 20 come in and fix it, and that the scope of the relief 21 being sought is to just expand it to all absentee 22 voters. 23 MS. HARRISON: That is not correct, Your 24 Honor. 25 THE COURT: All right.</p>	<p style="text-align: right;">Page 44</p> <p>1 absentee ballots as they come in. To keep on top of 2 that works so that by the time the Absentee Ballot 3 Review Board starts, everything has -- the basic fact 4 that the voter's ballot has been returned is already 5 in the system. 6 Now, Mr. Feldis has said a lot of stuff about 7 what those folks do, what codes they put in. Your 8 Honor, you've got to wait until you've got the 9 evidentiary record, until you've got the testimony of 10 the people who really do that work, and who really 11 oversee that work, and who really work with that 12 system. But I think the important thing that is in 13 the law that you must be aware of is that only the 14 Absentee Ballot Review Board makes any decision about 15 whether a ballot will be rejected. Loggers have no 16 legal authority to make those decisions. It's just 17 an administrative process. 18 This is such a difficult oral argument, Your 19 Honor, because we haven't gone through all those 20 evidentiary processes. I think it just really 21 illustrates why this is not a proper preliminary 22 injunction order to enter and why this, you know, 23 this court is not in a position to really make an 24 informed decision about this case in this incredibly 25 rushed schedule.</p>
<p style="text-align: right;">Page 43</p> <p>1 MS. HARRISON: That is not correct. Perhaps 2 you got that impression because the Division already 3 sent notice to voters whose primary election ballots 4 were rejected. My understanding is that is the 5 situation of Mr. Tompkins, that he did not have his 6 ballot witnessed in the primary election when that 7 requirement was still in force. So the Division on 8 September 9th sent him a notice that his primary 9 ballot had been rejected. 10 Now, so that's the only -- so that is the 11 post-election notice is the only -- so there's no 12 situation here where some voters are getting 13 preelection notice that their ballots are rejected. 14 So I hope that clarifies that, Your Honor. 15 THE COURT: Thank you. Appreciate it. 16 MS. HARRISON: Yes. And Mr. Feldis talked 17 again a lot about something which is not really in 18 the record. I certainly, you know, request that Your 19 Honor not rely on that until you've had the 20 opportunity to have those full evidentiary hearings 21 and have a discovery process about it and get 22 information about it from the folks who really know, 23 which is this ballot logging process. 24 I believe that it is sort of basically in the 25 record just that there is a process of logging</p>	<p style="text-align: right;">Page 45</p> <p>1 You know, there's no evidence in the record 2 and no one has had any opportunity to give evidence 3 or to consider a lot of the things that Mr. Feldis 4 was saying. You only can create a mail merge or 5 there wouldn't be any new need for programming. We 6 don't know that. Part of the reason that we don't 7 know that is because the plaintiff never, until 8 today, never said you wouldn't need to do any new 9 programming or you could just create a mail merge. 10 If their original motion had been specific 11 about exactly what they were asking for, then we 12 could have put specific information in the record 13 about one particular method or another particular 14 method. But the fact that the preliminary injunction 15 motion was so very vague means that the Division 16 couldn't meaningfully respond on a detailed level 17 with facts about any particular process or, you know, 18 request that the plaintiffs might be making. 19 So I think that goes back to the point about 20 Rule 65 that I was making as we started out, that 21 this is a very strangely vague request, and the 22 plaintiffs are asking the defendants to sort of 23 figure it out for them and suggesting it wouldn't be 24 difficult, but without actually saying what "it" is, 25 what it is that they want, you know, how exactly they</p>

<p style="text-align: right;">Page 46</p> <p>1 would want it to work.</p> <p>2 I think that goes back also, Your Honor, to</p> <p>3 the fact about the questions that you were asking</p> <p>4 earlier about the timing of this. There's actually</p> <p>5 no reason, Your Honor, for this incredibly compressed</p> <p>6 time frame. This basic requirement that a voter</p> <p>7 complete the certificate, sign, provide</p> <p>8 identification information, have a witness in other</p> <p>9 years, but this one has been on the books, as far as</p> <p>10 I can tell, since at least 1980, probably earlier.</p> <p>11 Mr. Feldis suggested there's been some recent</p> <p>12 changes. The most recent change to any of these</p> <p>13 parts that we're talking about, Your Honor, I believe</p> <p>14 was made in 2003 and that change was to Section</p> <p>15 081(f), but in a very minor way. It changed in -- if</p> <p>16 you go back and look at the statutory history, before</p> <p>17 2003 (f) said: The Director may require a voter</p> <p>18 casting an absentee ballot by mail to provide proof</p> <p>19 of identification. And it changed to: The Director</p> <p>20 shall require a voter casting an absentee ballot by</p> <p>21 mail to provide proof of identification.</p> <p>22 But the basic -- so that's the only change</p> <p>23 that I'm aware of in the last 20 years. Certainly</p> <p>24 the process for how it's been implemented has not</p> <p>25 changed at all recently. In fact, the details --</p>	<p style="text-align: right;">Page 48</p> <p>1 need for this judicial fire drill of everyone leaping</p> <p>2 into action during an incredibly packed busy time for</p> <p>3 the Division of Elections.</p> <p>4 Another reason is Rule 65. What they propose</p> <p>5 is too vague and nonspecific. Your Honor, Rule 65</p> <p>6 requires the plaintiffs to post a bond to cover the</p> <p>7 costs associated with a preliminary injunction, but</p> <p>8 we can't even figure out what those costs might be</p> <p>9 because we don't know what it is that they want the</p> <p>10 Division to try to do in any specific way that would</p> <p>11 allow us to say, you know, printing a mailer would</p> <p>12 cost X much, or hiring somebody to reprogram this</p> <p>13 machine would cost X much. We don't have that kind</p> <p>14 of detail to work with, and that's part of the way</p> <p>15 that this has violated Rule 65.</p> <p>16 Then to the merits, Your Honor, which we</p> <p>17 didn't spend a lot of time talking about, but is very</p> <p>18 well covered in the brief. On the balance of</p> <p>19 hardship, Your Honor, as you correctly pointed out,</p> <p>20 having to fill out a very simple form correctly is</p> <p>21 not an irreparable harm. This is a very plain, very</p> <p>22 simple requirement, very clearly explained in the</p> <p>23 instructions and by the Division of Elections. Any</p> <p>24 voter who is confused about the requirement or</p> <p>25 uncertain of what to do, there's contact information</p>
<p style="text-align: right;">Page 47</p> <p>1 excuse me -- the details as statistics about what</p> <p>2 ballots are rejected every year has been made</p> <p>3 available with the election results on the Division's</p> <p>4 website, I think, since 2016. So there's nothing</p> <p>5 here that's been cloak and dagger or mysterious about</p> <p>6 what's going on.</p> <p>7 Absentee voters have been receiving their</p> <p>8 notices of rejected ballots for years and years.</p> <p>9 Nothing being done differently this cycle or</p> <p>10 recently.</p> <p>11 THE COURT: Thank you, Ms. Harrison.</p> <p>12 MS. HARRISON: Your Honor, I'm about at my</p> <p>13 half-hour. Unless you have some more questions for</p> <p>14 me, I'll just conclude briefly.</p> <p>15 THE COURT: I don't have any questions at</p> <p>16 this time. Go ahead.</p> <p>17 MS. HARRISON: All right. Then, Your Honor,</p> <p>18 I just want to recap sort of the legal hurdles here</p> <p>19 that the Division believes that the plaintiffs have</p> <p>20 failed to clear and the multiple reasons, Your Honor,</p> <p>21 for denying their motion for a preliminary</p> <p>22 injunction.</p> <p>23 The first is that it's too late, as we were</p> <p>24 just discussing. This is a statute and a process</p> <p>25 that's been around for years and years. There's no</p>	<p style="text-align: right;">Page 49</p> <p>1 on the instruction sheet. They can call the Division</p> <p>2 of Elections and get more assistance.</p> <p>3 If there are still concerns that they won't</p> <p>4 be able to get the process of filling out that</p> <p>5 certificate correctly, there are lots of other ways</p> <p>6 for them to vote. That person can still vote early,</p> <p>7 vote absentee in person with the assistance of an</p> <p>8 absentee voting official, vote at the polls. If a</p> <p>9 person has a difficulty with it due to a disability,</p> <p>10 they could get a special needs representative.</p> <p>11 There's lots of different ways to fulfill that right</p> <p>12 to vote.</p> <p>13 And then finally, Your Honor, on the question</p> <p>14 of have the plaintiffs established probable success</p> <p>15 on the merits? As I began this argument, this</p> <p>16 statute passes the Anderson verdict test requirement</p> <p>17 for constitutionality. It's a very simple test.</p> <p>18 It's very simply completed in this case. The</p> <p>19 requirement that's on the books is justified by the</p> <p>20 State's needs to prevent fraud and ensure an orderly</p> <p>21 and efficient election.</p> <p>22 Now, the plaintiff may have some good policy</p> <p>23 arguments for why a different system would be a good</p> <p>24 idea, but those policy arguments are for the</p> <p>25 Legislature. They're not for this court. This court</p>

<p style="text-align: right;">Page 50</p> <p>1 shouldn't be holding committee hearings about, you 2 know, how the system should work and what we might do 3 differently and how it might be improved. There's a 4 process that exists for that in the Legislature. 5 So, Your Honor, the Division respectfully 6 requests you deny this motion for preliminary 7 injunction. Put this matter on for the regular 8 process of discovery and briefing on the regular time 9 frame after the election. 10 Thank you. 11 THE COURT: All right. Thank you, 12 Ms. Harrison. 13 Mr. Feldis, you have your -- I think you 14 reserved 10 minutes. So it's all yours. 15 MR. FELDIS: Thank you, Your Honor. 16 Your Honor, the only thing that's too late 17 here is it's too late to wait. This is 18 unprecedented. We are estimating that there's going 19 to be 500 eligible Alaskan voters whose votes will 20 not be counted. The State has absolutely -- in all 21 of those 30 minutes they have not articulated any 22 legitimate State interest in failing to count those 23 votes. 24 Ms. Harrison just said preventing voter 25 fraud; that's not an issue in this case. Nothing</p>	<p style="text-align: right;">Page 52</p> <p>1 MR. FELDIS: Because they're eligible voters. 2 They've taken every possible step to have their vote 3 count, and when they sealed the ballot -- they filled 4 out the ballot. They did it in time. They 5 registered to vote. When they put the cover down and 6 licked the outside, they didn't sign the outside of 7 that envelope. 8 THE COURT: All right. But you're not saying 9 it's because of some mistake the State made? 10 MR. FELDIS: It's because what the State is 11 not willing to do, and it has no legitimate interest. 12 It's putting an undue burden by not giving a cure. 13 THE COURT: Well, I don't want to confuse 14 things. I'm just separating cause and effect here. 15 There's no claim in this case -- I mean, one of the 16 points Ms. Harrison made is that these are voter 17 errors, and there's no claim that these are -- that 18 the initial failure to comply with the requirements 19 are State errors. 20 MR. FELDIS: No, but that -- I think we have 21 a false -- correct, Your Honor. But what I'm trying 22 to point out is that's not the test and that -- while 23 the State is throwing out there that there should be 24 a difference between something that the State did or 25 failed to do and something that the voter did or</p>
<p style="text-align: right;">Page 51</p> <p>1 being suggested impacts voter fraud issues. That's a 2 red herring here. 3 We're not asking that any requirements be 4 removed. We're just asking that an additional due 5 process requirement be allowed. 6 So what has the State said is their interest 7 here? They haven't. What is the legitimate State 8 interest in preventing voters from voting? There is 9 none. The Alaska Supreme Court in Miller 10 v. Treadwell was very clear. No voter shall be 11 disenfranchised because of a mere mistake. That's 12 what the State is doing here. They're blaming the 13 voter for mistakes and saying: Well, you know, you 14 should have known better. That's not how our system 15 of government works, nor how it should work, and 16 that's not how the due process clause works, nor how 17 the courts have ever interpreted the due process 18 clause. 19 Due process protections don't blame the 20 victim, but that's what the State is trying to do 21 here. They're blaming voters who make honest 22 mistakes that are predictable -- 23 THE COURT: Excuse me, Mr. Feldis. I'm 24 sorry, I just had to interject. When you say "blame 25 the victim", in what way are they a victim?</p>	<p style="text-align: right;">Page 53</p> <p>1 didn't do, that's not the test for due process. The 2 test is: What is the burden on the State for -- why 3 would the State burden the voter in this way to 4 exclude those votes? So that's really not the 5 analysis that -- 6 THE COURT: Well, what if a voter doesn't 7 register at all? Does the State have an obligation 8 to go knock on their door and register them? 9 MR. FELDIS: But that's not the situation 10 here. These people have already registered. 11 THE COURT: Of course it's not the situation, 12 but you were saying there's an affirmative duty on 13 the State to do something to cure a voter's -- 14 something the voter has not done. 15 So how far does this go? 16 MR. FELDIS: Well, in this case I guess I 17 would have to point to what the Alaska Supreme Court 18 said, that we don't want to disenfranchise voters 19 because of mere mistakes. So in that case, of course 20 we all know it was -- you know, did somebody spell a 21 name correctly? Did they give an abbreviation or 22 initials? And the Court was clear. Look, if 23 somebody made a mistake, we're not going to discount 24 their vote. We understand there have to be rules in 25 place, deadlines in place for mailing votes, but here</p>


<p style="text-align: right;">Page 54</p> <p>1 this is a correctable situation.</p> <p>2 The line could be eligibility to vote. If</p> <p>3 you didn't register, you're not eligible. If you're</p> <p>4 not eligible for some other reasons, there's lines</p> <p>5 that can be drawn here that don't unduly burden</p> <p>6 voters. Here, what would be the legitimate State</p> <p>7 interest in not taking these extra steps?</p> <p>8 THE COURT: Well, I think that's what the</p> <p>9 State is arguing. It's not my job to draw the lines</p> <p>10 and, in fact, it's not just not my job, it would be</p> <p>11 improper for me to do so. That's the State's</p> <p>12 argument.</p> <p>13 MR. FELDIS: Right. And what we're saying is</p> <p>14 they haven't addressed the clear Alaska precedent</p> <p>15 here from the Alaska Supreme Court, Parr v. Thomas,</p> <p>16 Miller v. Treadwell, which says just the opposite.</p> <p>17 And the State has no argument against those. There</p> <p>18 are numerous cases around the country that Your Honor</p> <p>19 can look to to support reading the statute so it</p> <p>20 doesn't place an undue burden on the right to vote</p> <p>21 and so that it doesn't deny due process of law.</p> <p>22 So we're not alone here. We're not on the</p> <p>23 cutting edge. We're well within what the Alaska</p> <p>24 Supreme Court said we should be doing. And the fact</p> <p>25 that this has never been challenged before is really</p>	<p style="text-align: right;">Page 56</p> <p>1 notifying them and giving somebody an opportunity to</p> <p>2 submit a new piece of paper. Like the Municipality</p> <p>3 of Anchorage does, like Juneau does, like many other</p> <p>4 states do.</p> <p>5 So the State is making this very expansive,</p> <p>6 but really the remedy is very concrete and very</p> <p>7 straightforward and not very burdensome at all. So</p> <p>8 to say this is vague is not --</p> <p>9 THE COURT: It sort of depends on what you</p> <p>10 want to put on the scale. You put virtually no --</p> <p>11 nothing on the scale for the State and, on the other</p> <p>12 hand, the State is arguing that the burden for the</p> <p>13 voter is de minimus, that it's simply got a couple of</p> <p>14 fairly straightforward requirements by law to</p> <p>15 complete to have your absentee vote properly counted.</p> <p>16 That's a pretty low threshold burden and doesn't</p> <p>17 justify throwing topsy-turvy the whole election</p> <p>18 process on the eve of the election.</p> <p>19 MR. FELDIS: But would it really do that,</p> <p>20 Your Honor? There's no evidence that that would</p> <p>21 happen. I think we are allowed to rely on common</p> <p>22 sense and the manual, the publicly available</p> <p>23 information. Nothing is going to change how the vote</p> <p>24 counts. We're not asking for the election to be</p> <p>25 continued or new ballots to be printed or anything.</p>
<p style="text-align: right;">Page 55</p> <p>1 respectfully neither here nor there. We're in a</p> <p>2 different situation than we were ever in before. The</p> <p>3 magnitude is different. It's now front and center.</p> <p>4 It's an ongoing harm. And that's what the law says,</p> <p>5 that's how the due process clause is interpreted.</p> <p>6 The fact that this could have been corrected</p> <p>7 before or the fact that it was never challenged</p> <p>8 doesn't change anything. There's lots of</p> <p>9 constitutional violations that have happened over the</p> <p>10 years that people have challenged and it's not of any</p> <p>11 moment to say you could have come forward earlier.</p> <p>12 There's still time and I wanted to address</p> <p>13 that, Your Honor. I think the State is arguing that</p> <p>14 we're asking for something different than we really</p> <p>15 are. The Absentee Review Boards begin work 7 days</p> <p>16 prior to the election. That's the time period we're</p> <p>17 talking about here. Until 15 days after 22 days, the</p> <p>18 Absentee Review Boards are already doing this work.</p> <p>19 They're already separating out the ballots. We're</p> <p>20 not asking for anyone else to get involved. There's</p> <p>21 no new employees or training.</p> <p>22 The people already designated with the</p> <p>23 authority to separate out the ballots and enter the</p> <p>24 information into the system, if someone forgets their</p> <p>25 signature, the additional step requires actually just</p>	<p style="text-align: right;">Page 57</p> <p>1 We're asking for a few extra steps to allow a few</p> <p>2 more voters to vote. Maybe 500. If they don't get</p> <p>3 to all 500, that doesn't mean it's fatally flawed.</p> <p>4 So they haven't pointed to a State interest.</p> <p>5 That's what they have to do. The only one they've</p> <p>6 pointed to, avoiding voter fraud, is a red herring.</p> <p>7 That's not what's happening.</p> <p>8 THE COURT: Well, they've pointed to the</p> <p>9 State's interest in the free and fair and orderly</p> <p>10 administration of elections.</p> <p>11 MR. FELDIS: Understood.</p> <p>12 THE COURT: And they have cited voter fraud,</p> <p>13 not because they're worried so much that this is</p> <p>14 going to invite voter fraud, but that the voter fraud</p> <p>15 concern is one of the underlying bases for the policy</p> <p>16 of requiring these formal requirements before you</p> <p>17 count S&T votes. So the voter fraud issue goes to</p> <p>18 the constitutionality of the requirement, but their</p> <p>19 burden is -- what they're claiming is burdensome for</p> <p>20 them is the extent to which this last-minute request</p> <p>21 will interfere with the orderly and efficient</p> <p>22 administration of the election.</p> <p>23 MR. FELDIS: And we see no evidence that it</p> <p>24 will, Your Honor, and I understand that. I think the</p> <p>25 burden here is low, you know. I think the math tells</p>

<p style="text-align: right;">Page 58</p> <p>1 us it could be 20 ballots, 25 ballots a day that need 2 to be -- that are already being entered, and I think 3 that the record is clear on that and there's no 4 dispute. This information is already going into the 5 system. 6 So in one way we have to ask: Why is the 7 State opposing this? It shouldn't be just oppose at 8 all costs. It should be: How can we make this 9 happen? If there's no compelling interest that can 10 be evidenced here, other than a generalized concern 11 that we have a lot to do, that's far less than 12 disenfranchising voters because that's the end result 13 here. And that should be the balance. 14 The harm to the voter is votes not counting, 15 and that's a harm to democracy. Here we'd be saying: 16 What's the harm to the Division? And it may require 17 a little bit of extra work, but it's not going to 18 throw the election into chaos, nor have they 19 suggested it has. We're not asking that the votes -- 20 you know, things not be certified 15 days. We've got 21 22 days to work with. We're unique in Alaska with 22 these 22 days. Lots of other states have things in 23 place and courts have ordered them, even at the last 24 minute, far less time than we have here. So I do 25 want to suggest that we're not too late at all.</p>	<p style="text-align: right;">Page 60</p> <p>1 make that happen in this election unless there's an 2 absolute compelling State interest, which there isn't 3 here. So I understand this is preliminary, but 4 that's because it's so important. The danger of 5 irreparable harm is so high and the State is 6 adequately protected. 7 THE COURT: Well, the State would say if it's 8 so important, why wasn't this brought up several 9 months ago? 10 MR. FELDIS: But again, respectfully, that is 11 not an issue that the Court should be giving great 12 weight to because the fact is this wasn't done -- 13 this is not a sandbagging and no one has suggested 14 that. And that's not the process -- 15 THE COURT: Why isn't it -- I'm sorry, 16 Counsel. Why isn't it important for the Court to 17 have an adequate time in a deliberate fashion to 18 consider issues that you're telling me are of 19 principal importance? 20 MR. FELDIS: No, not that the Court -- 21 THE COURT: Why should it be done on a rush 22 basis? 23 MR. FELDIS: In order to prevent -- 24 THE COURT: If it's that critical and of such 25 a high public interest, why do you wait until several</p>
<p style="text-align: right;">Page 59</p> <p>1 We've actually got plenty of time for this to 2 take place. They just mailed 4800 mailers out last 3 week. We're talking about 500 in the course of 22 4 days. So I do want to just put that on the table, 5 that I haven't seen evidence of a burden that is 6 really overwhelming on this date. 7 THE COURT: Well, remember who has the burden 8 of showing that in this case. 9 MR. FELDIS: Absolutely, and we turned to the 10 State of Alaska, Division of Elections manual on 11 absentee ballots, Exhibit 1, which talks about all of 12 these things going forward. So we put forth evidence 13 that the process is already in place. We've shown 14 that data is already being entered into the system, 15 that it's already being mailed out. We're just 16 asking for it to be done sooner. No one suggested it 17 can't be, other than it will add some amount of 18 process. 19 THE COURT: But you haven't taken any 20 discovery yet or deposed a witness? 21 MR. FELDIS: No, and that's why we're here at 22 this early stage, and we're talking about balancing 23 the known burdens and implementing a remedy that will 24 actually prevent a huge harm; 500 voters who will not 25 have their votes counted. Why would we not try to</p>	<p style="text-align: right;">Page 61</p> <p>1 weeks before the election to file this case? 2 MR. FELDIS: And not at all suggesting, Your 3 Honor, that it's not important for the Court to have 4 that information. What I'm talking about is from a 5 due process perspective, that this is an ongoing harm 6 and so, therefore, the fact that we're here at the 7 last minute is not a basis that we shouldn't be 8 considering the harm that's going to occur. 9 THE COURT: Well, you're asking me to make a 10 very important decision based on an inadequate and 11 incomplete record. In fact, zero factual -- or 12 almost no factual evidence. Nothing that has been, 13 you know -- you can possibly consider on a motion for 14 summary judgment to the extent it's a sworn 15 affidavit, but then the issue is just whether there 16 are any genuine issues of fact, and everybody would 17 have to concede there are lots of genuine issues of 18 fact. 19 So we're really at an early stage where 20 representations like 500 voters will lose their vote 21 are possibly true and possibly hysterical. I don't 22 know. 23 MR. FELDIS: Well, the Division has made 24 publicly available statistics from past years that 25 can be extrapolated out. So we're not talking about</p>

<p style="text-align: right;">Page 62</p> <p>1 anything that isn't just a public record here. 2 THE COURT: Public record on past years is 3 still speculation as to what's going to happen on 4 November 3rd. 5 MR. FELDIS: Right. Understood. We don't 6 know, but I think that we've certainly got a record 7 to rely upon that can be, you know, rationally and 8 reasonably extrapolated out. 9 We've also got the Division of Elections 10 ballot manuals and their own data about how they do 11 the process. So nothing that we're positing is not 12 factually supported. Voting right cases are often -- 13 and I understand the situation we're all in -- that 14 we all find ourselves in, and that's what I'm 15 suggesting. This isn't a situation that plaintiffs 16 had created or necessarily defendants have created 17 other than not being -- having addressed a remedy 18 earlier. We're all here in this situation. Voting 19 rights cases are very often at the last minute 20 because these issues come to the forefront. We only 21 learned the number of ballots going out the door were 22 so exponentially greater very recently. It was the 23 State that -- 24 THE COURT: Yeah, but the knowledge of the 25 procedure of the Department and how they handle</p>	<p style="text-align: right;">Page 64</p> <p>1 disenfranchise voters because of mistakes that they 2 made. 3 So I understand the need and the desire. We 4 want to get this right, and we need to get this 5 right. But getting it right here means putting in a 6 process that allows those votes to be counted. I 7 know this is a very hard situation, but it's not 8 unusual, and it's not one that -- again, we would 9 have to look to other court decisions that other 10 courts have grappled with and found necessary 11 remedies even 30 days before elections. 12 There was the Florida case. Democrat 13 Executive Committee of Florida versus 14 (indiscernible), which was done even after the 15 election day came and went, when there was still time 16 to correct remedies before the election was 17 certified. 18 THE COURT: Well, we're 19 days before the 19 election now. 20 MR. FELDIS: Right, and I'm just counting the 21 15 days after until the certification date -- 22 THE COURT: Right. 23 MR. FELDIS: -- time period here, which again 24 makes the remedy more feasible in Alaska than in 25 other places that have also implemented similar</p>
<p style="text-align: right;">Page 63</p> <p>1 absentee ballots has been known, I think Ms. Harrison 2 said, for four years. 3 MR. FELDIS: The way the State handles their 4 absentee ballots? 5 THE COURT: Right. 6 MR. FELDIS: Right. Now we know the 7 magnitude of the injury that's going to occur this 8 election. 9 THE COURT: Well, we don't know the 10 magnitude. I just thought we'd established that. 11 We're speculating based on past statistics. So three 12 years ago you knew the magnitude of what happened in 13 2016, but no suit was brought. 14 MR. FELDIS: And, again, with all respect to 15 wanting to have the right answer here, of course we 16 want the right answer here, but this has come to the 17 forefront because I think we got four times as many 18 absentee ballots this year as in the past. We know 19 that the Division has tweeted, just a week ago, 20 letting people know -- citizens, Alaskan voters who 21 didn't know this before, including the plaintiffs 22 here who didn't know this before, come to the Court 23 seeking to avoid what the Alaska Supreme Court would 24 say is a construction of a statute and implementation 25 of a policy on the part of the Division that will</p>	<p style="text-align: right;">Page 65</p> <p>1 remedies. 2 So I guess just to step back and conclude, 3 and I want to address any other questions the Court 4 has -- 5 THE COURT: I don't have any other questions. 6 Thank you for asking, though. 7 MR. FELDIS: Then just to conclude, Your 8 Honor, the State hasn't addressed the Alaska Supreme 9 Court precedent of not disenfranchising voters 10 because of mere mistakes. They have not addressed 11 the instruction of the Alaska Supreme Court to 12 interpret statutes in a way that avoids undue burden 13 on the right to vote. 14 That's the situation that we find ourselves 15 in. We have enough evidence here. We have enough in 16 the public record. We have enough presented even in 17 just the Ballot Review Board's Manual to know that 18 all of these processes are in place, other than 19 sending out the notice in time for a voter to become 20 aware that they missed their signature and in time 21 for them to do something about it. 22 This is not a case of creating new laws or 23 creating new policies. It's a case of sending 24 notices earlier than they're currently being sent to 25 avoid a huge impact on the voter, and the State has</p>

<p style="text-align: right;">Page 66</p> <p>1 not, and really we would suggest cannot in this case, 2 given what we know about what's already being done 3 and how that ballot review boards already work, they 4 cannot present a compelling State interest of why 5 they would want to -- and why the Constitution, State 6 constitution would allow them to impose this burden 7 on voters.</p> <p>8 I have to think that everyone working 9 together, if asked, would say that this is the right 10 result. This is what should happen. Voters who are 11 eligible and cast their ballot should have their 12 votes counted. This is not a surprise that there are 13 going to be more problems this year than ever before, 14 and I understand the Court's concern that we don't 15 know the exact number; but we know that it will occur 16 and we know that something can be done about it.</p> <p>17 So we would ask, Your Honor, that you look at 18 the danger of irreparable harm to those voters whose 19 votes will not be counted, and that you find that 20 there are serious and substantial questions as to the 21 merits, and that you enter the injunction requiring 22 the State to give notice and an opportunity to cure 23 in three very concrete ways that we've spelled out: 24 By mail, by the publicly available posting on the My 25 Alaska Vote, and by allowing public requests for this</p>	<p style="text-align: right;">Page 68</p> <p>1 right results or attempting to avoid, quote, wrong 2 results, that is, results that I personally think are 3 right or that I personally think are wrong.</p> <p>4 The job of a judge is to apply the law 5 dispassionately and as fairly as possible, that it 6 is -- sometimes this may be a prehistoric conception 7 of the job of the judge, but it's the job of the 8 judge to apply the law and the job of the Legislature 9 to -- who are the elected representatives of the 10 people of the State -- it's the job of the 11 Legislature, of course, to enact the law. I really 12 think that fundamental proposition is at play in this 13 case.</p> <p>14 The plaintiffs do not assert there is 15 anything unconstitutional in the absentee voting -- 16 in the statute that pertains to absentee voting, any 17 of the statutes. They do not find or argue that 18 there is defect in them. They maintain that the 19 manner in which it's applied is unconstitutional, yet 20 they don't argue and they're unable to point that it 21 is being applied in a way inconsistent with the 22 statute.</p> <p>23 So I have a situation before me in which the 24 representative of the administrative executive branch 25 of the State is applying the statute created by the</p>
<p style="text-align: right;">Page 67</p> <p>1 information and asking that the Division respond 2 timely to those so that folks can be notified in 3 several different ways and have the ability to 4 correct their ballot through a one-page affirmation 5 that's already been created by the State.</p> <p>6 Thank you for considering all that, Your 7 Honor, and for your attention to this today.</p> <p>8 THE COURT: Thank you, Mr. Feldis. I had 9 intended that over the past half-hour that I would be 10 in recess to deliberate over the arguments. I have 11 another matter, important matter. Every matter is 12 certainly important to the participants, and this may 13 be -- the matter currently before me may be more 14 important to more folks in the state, but I do need 15 to -- I'm forced by the calendar, the inevitable 16 pressure of the calendar, to accelerate the 17 deliberative process and give you an outcome 18 immediately.</p> <p>19 I've listened to both sides and read your 20 materials. I guess I would start with certain 21 observations that the -- Mr. Feldis made a point that 22 this is -- at the end in his last remarks, that this 23 would be the right result, the result he seeks would 24 be the right result. As a judge, I do not have the 25 luxury, I have to say, of attempting to reach, quote,</p>	<p style="text-align: right;">Page 69</p> <p>1 Legislature, that the plaintiffs acknowledge it is 2 constitutional as written, and the administrative and 3 executive branch is applying the statute as written. 4 And yet I'm being told that it is -- I should find 5 that it is -- nonetheless we are dealing with a 6 constitutional violation in this case.</p> <p>7 We really are dealing with a bottom question 8 of statutory interpretation, only we're interpreting 9 something that's not -- we're interpreting a statute 10 and dealing with language that's not present. We 11 are -- at bottom I think the argument of the 12 plaintiffs is that the statute should have been 13 written differently, that things were left out that a 14 wise Legislature should have put in, or that now -- 15 I'll put quotes around it -- a wise judge should put 16 in.</p> <p>17 I would cite the parties to one of the canons 18 of statutory interpretation that is found in the -- 19 I'm citing from Justice Scalia's work on statutory 20 interpretation, but you could trace it back to Judge 21 Felix Frankfurter. Frankfurter's comment was: 22 Whatever temptations the statesmanship of 23 policy-making might wisely suggest, construction must 24 eschew interpretation and evisceration. The judge 25 must not read in by way of creation.</p>

<p style="text-align: right;">Page 70</p> <p>1 He's speaking of this situation in which the 2 statute is silent, and the basic canon is that 3 nothing is to be added to what the text states or 4 reasonably implies, that is, a matter not covered is 5 to be treated as not covered. 6 So there is nothing in the statute that 7 requires the Division of Elections to follow the 8 process that the plaintiffs in this case are urging, 9 which is to, on a more rapid time scale, ascertain 10 whether there are defects in absentee ballots and 11 provide notice on a time frame that could allow a 12 voter to revote or somehow correct the situation. 13 I'm not implying the vote would be counted twice, but 14 that the voter would have some opportunity to cure. 15 So they're asking for -- a do-over is the 16 term that Ms. Harrison used, and that somehow the 17 absence of a procedural process installed by the 18 Division of Elections to enable these do-overs 19 amounts to a constitutional violation. 20 I'm -- I think that's -- that's, I think, in 21 essence the nature of the claim. It is characterized 22 in this case as a disenfranchisement of the voter if 23 this do-over process is not read into the law. It's 24 not in the law. We all can see that. There's no 25 attempt to argue that it is, and there's no attempt</p>	<p style="text-align: right;">Page 72</p> <p>1 Alaska. And there are competing interests in 2 elections. There are interests in avoiding voter 3 fraud, which is why they have those requirements in 4 the first place. There's also interest in timely 5 reporting and analysis and collating of the election 6 data, and producing election results. So that's the 7 basic framework. 8 It was really well described, I think, on the 9 record by Ms. Harrison. In that I'm being asked to 10 find that unless I impose additional requirements not 11 already there, that voters are going to be 12 disenfranchised and that an unconstitutional process 13 will result. I don't find that that is supported 14 legally, not necessarily even factually. The 15 requirements for a preliminary injunction include 16 finding of irreparable harm, and they include a 17 finding of substantial likelihood of success on the 18 merits or probability of success on the merits. 19 Based on what's been argued today, I can't find that 20 the plaintiff has met their burden of showing either 21 one of those. 22 I do not find that if a voter fails to follow 23 rules that everyone acknowledges are fair and have a 24 legitimate basis, that if the voter makes a mistake, 25 even an innocent mistake, that the existing law</p>
<p style="text-align: right;">Page 71</p> <p>1 to argue that it should be required. There's just 2 this argument that because it's not applied 3 administratively, somehow an unconstitutional action 4 has occurred. That's an interesting argument. 5 Essentially, the plaintiff in this case does 6 not feel that it would assume -- be very persuasive 7 to argue that because the statute says nothing about 8 the do-over, it should be read into the statute 9 expressly. So instead of saying that the statute is 10 unconstitutional because it does not include the 11 provision for correcting and enabling an opportunity 12 to correct an absentee ballot, that because that is 13 not included in the statute, the plaintiffs are 14 arguing that -- are not arguing that that is 15 unconstitutional. They're arguing that the Division 16 should have read it into the statute. Well, that's 17 really two sides of the same coin, and it really is 18 an attempt to read into the statute a requirement 19 that is not there. 20 So I think Ms. Harrison, on behalf of the 21 Division, makes a very valid fundamental point that 22 that's a policy decision. The deadlines that are 23 imposed and that are required by the Legislature for 24 treating absentee ballots are a policy decision made 25 by the elected representatives of the citizens of</p>	<p style="text-align: right;">Page 73</p> <p>1 requires that the Department not only detect that 2 mistake, but if they do detect it, and it is their 3 obligation to try to detect it, that's what they're 4 trying to do in reviewing and scanning absentee 5 ballots, but then notify the voter in a fashion that 6 enables the voter to come in and vote within a 7 certain time frame. 8 The argument that it is disenfranchisement of 9 the voter if they're not notified in time to come in 10 and correct the error, I think confuses a cause and 11 effect. In these situations the burden on the voter 12 is fairly de minimus. There are ample resources that 13 are made available in call lines and explanations for 14 voters who have confusion about them. Ultimately, if 15 a voter fails to comply with one of those 16 requirements, it's the voter who disenfranchises him 17 or herself, not the State. In a perfect world 18 perhaps everything would be done in a time frame in 19 which all errors could be avoided and all errors 20 could be corrected, and maybe no errors would ever 21 occur in a perfect world. A perfect world does not 22 exist. 23 The basic thrust of the plaintiffs' case in 24 this -- the argument in this case is that the Court 25 should take over the policymaking function of the</p>

<p style="text-align: right;">Page 74</p> <p>1 Legislature. I don't believe the Court has any more 2 wisdom and, you know, probably less than the elected 3 representatives of the citizens of the state. I like 4 to tell jury panels that the fundamental unit of 5 self-government in the State is a jury, and every 6 jury trial I've ever presided over I've had juries 7 that I think collectively through their collective 8 actions and collective judgment displayed an outcome 9 and reached an outcome that reflected that the whole 10 is greater than the sum of the parts, that acting as 11 a unit they achieved something in the administration 12 of justice that is, I think, infinitely superior to 13 what one solitary individual might or would have come 14 up with in that situation. I think they had an 15 innate sense of fairness and an innate ability to 16 engage in balancing considerations and reaching a 17 just and fair result based on facts and evidence. 18 I think largely that's true, and it should be 19 true of any democratically elected legislative body. 20 Although we may make fun of and disparage 21 legislatures and politicians, ultimately there is no 22 republic without it. 23 It's really the role of the Court to respect 24 their realm just as they respect ours. Plaintiffs 25 ask in this case that I sit here and, like Plato,</p>	<p style="text-align: right;">Page 76</p> <p style="text-align: center;">TRANSCRIBER'S CERTIFICATE</p> <p>1 2 3 I, Leslie J. Knisley, hereby certify that the 4 foregoing pages numbered 1 through 76 are a true, 5 accurate, and complete transcript of the Oral 6 Argument held on October 15, 2020, in The Alaska 7 Center Education Fund, et al. versus Gail Fenumiai, 8 et al., Case No. 3AN-20-08354 Civil, transcribed by 9 me from a copy of the electronic sound recording to 10 the best of my knowledge and ability. 11 Dated October 16, 2020, 12  13 14 15 16 17 18 19 20 21 22 23 24 25 Leslie J. Knisley, Transcriber</p>
<p style="text-align: right;">Page 75</p> <p>1 dream up a new republic. Well, I would say to you 2 that a judge's republic is a contradiction in terms. 3 The motion for preliminary injunction is 4 denied. We'll set this case on for a status 5 conference in approximately 60 days. Thank you. 6 We'll go off record. 7 10:45 a.m. 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	

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